Supreme Court, U.S.
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No. 00-1254

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND H & H CONSOLIDATED, INC.,
Petitioners,

v.

FREDERICK A. PUSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT FREDERICK PUSEY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent takes issue with Petitioners' statement of the Question Presented and re-states as follows:

Did the court below err when it made a factual determination that a state employment statute applies on a federal enclave, since the federal government no longer has exclusive jurisdiction on the enclave?

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Respondent Frederick Pusey respectfully submits this Brief in Opposition to the Petition of Local Lodge 2552, International Association of Machinists and Aerospace Workers ("IAM"), District Lodge 74, IAM, ("unions") and H & H Consolidated ("employer"). Respondent Pusey urges that the Court deny the Petition.

STATEMENT OF THE CASE

In February 1940, the Virginia General Assembly ceded to the federal government "exclusive" jurisdiction for unspecified lands to be acquired within the Commonwealth for construction of naval air fields to aid in the defense of the Naval Operating Base at Hampton Roads (Norfolk). This cession of "exclusive" jurisdiction was not without condition, however. The Virginia General Assembly specifically conditioned the continued grant of "exclusive" jurisdiction by providing "*that the jurisdiction hereby ceded shall continue no longer than* the United States shall own such lands in fee simple and *they shall be used and occupied by the United States for naval purposes.*" (1940 Virginia Acts of Assembly, ch. 14; Stipulated Exhibit ("Ex.") A. (Emphasis added). Additionally, in February 1940, Congress amended 40 U.S.C. § 255 to clarify how federal agencies could acquire "exclusive" jurisdiction over lands owned or acquired by the federal government. (Ex. B).

During World War II, the federal government acquired by condemnation three parcels of land (Parcels I,

II and III) in Accomack County, Virginia for construction of the Naval Air Station[1] in Chincoteague, Virginia. Pursuant to federal and state laws, the U.S. Navy acquired "exclusive" jurisdiction over each of these parcels of land. (Exs. C–F3).

In April 1947, Virginia enacted a Right to Work law declaring that it was "the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization." VA. CODE ANN. §§ 40.1-58 to -69 (Michie 1994). Other sections of the law made it unlawful for an employer to require an employee to join a union or pay dues, fees or other charges to it as a condition of employment. The prohibitions of the law applied to any and all contracts negotiated subsequent to April 30, 1947. The law also provided for a private cause of action by any person injured by violation of his right to work.

In 1952, the federal government acquired an additional parcel of land (Parcel IV) to expand the Navy's facilities at Naval Air Station Chincoteague. (Exs. C, G1–2). A detailed review of the land records of Accomack County, and of the files of the U.S. Navy, the National

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[1]At various times during its existence, the U.S. Navy designated its air station at Chincoteague, Virginia as Naval Air Station ("NAS") Chincoteague, Naval Auxiliary Air Station ("NAAS") Chincoteague, and Naval Aviation Ordnance Test Station ("NAOTS") Chincoteague.

Aeronautics and Space Administration ("NASA"), and the Virginia Attorney General's Office fails to disclose any attempt by the federal government to acquire "exclusive" jurisdiction over Parcel IV. (Exs. J, K4–6, U1–2, W1). In fact, the only two records that address this issue indicate that the U.S. Navy never sought to acquire "exclusive" jurisdiction over Parcel IV. (Exs. C (Legend), G3). Accordingly, pursuant to 40 U.S.C. § 255, it conclusively must be presumed that the federal government never acquired "exclusive" jurisdiction over Parcel IV.

On June 30, 1959, the U.S. Navy officially closed its naval air station at Chincoteague, Virginia and transferred the base and its facilities on an interim occupancy permit to NASA, which renamed it the Wallops Flight Facility. (Ex. H2). A formal base closing occurred that year. The Navy commander lowered its American flag and a flag belonging to NASA was raised. All Navy personnel departed. In December 1961, the U.S. Navy formally transferred all of the real property and improvements of its former air station to NASA. (Ex. H3).

In January 1987, Respondent Frederick Pusey, a retired United States Army Sergeant Major, went to work for the Klate-Holt Company (a predecessor to Petitioner H & H Consolidated) as an electronics technician, and was employed at the company's offices on the Wallops Flight Facility. Local Lodge 2552, IAM and District Lodge 74, IAM served as the exclusive bargaining representatives of Klate-Holt employees. The unions and Klate-Holt (and its

successors, including H & H Consolidated) were parties to a series of collective-bargaining agreements.

In the fall of 1987, some **twenty-eight (28) years after closing its air station** and **twenty-six (26) years after transferring all property and buildings to NASA**, the U.S. Navy **returned** to a portion of Wallops Flight Facility as a ***tenant*** and entered into a formal Host-Tenant Agreement with NASA.

As a tenant, the U.S. Navy established an "AEGIS Combat System Center" to train naval personnel in operating its Aegis missile system from launch facilities on Wallops Island.[2] (Exs. K1-3). In addition to its operations on Wallops Island (over which the federal government never had exclusive jurisdiction), the Navy located some of its administrative and housing facilities on Parcel IV of the Wallops Flight Facility (again, land over which the federal government never had exclusive jurisdiction).

The Navy did **not** return to the three land parcels over which it had at one time acquired exclusive jurisdiction. The only use by the Navy of the mainland parcels after its abandonment was that, from 1987 forward, the Navy occasionally used the mainland parcels for unscheduled landing and refueling during training exercises from a

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[2]The actual AEGIS training and missile launch facilities are located on Wallops Island itself and are not part of the original four parcels that compromised the Naval Air Station. It was on Wallops Island that NASA launched missiles for the Navy.

Maryland naval base, and made it available for emergency landings. In summary, after abandoning and transferring Parcels I, II and III to NASA, the Navy never returned to those parcels. Twenty-six (26) years after departing, the Navy may have occupied, as tenants, Parcel IV (over which the federal government never had exclusive jurisdiction) and did occupy Wallops Island over which the federal government also never had exclusive jurisdiction.

In the spring of 1988, the officer-in-charge of AEGIS Combat System Center expressed concern to his superiors about the jurisdictional status of the Wallops facility, since the U.S. Navy was making a large scale commitment there. Subsequently, NASA and the U.S. Navy exchanged letters concerning the jurisdictional status. Although these letters discussed legal theories for finding "exclusive" federal jurisdiction, there was never any final resolution to the question. In a November 1988 Memorandum for the Record, NASA's counsel reiterated his belief that NASA did not have exclusive jurisdiction but had only "proprietary" jurisdiction over the Wallops Flight Facility. (Exs. K3-6).

In 1989, the unions, as the exclusive bargaining representatives of employees working for private contractors operating on the Wallops Flight Facility, began negotiating "union-security" agreements with the private contractors, including Klate-Holt. After many non-union employees, including Mr. Pusey, refused to join or support the unions as required by the union-security agreements, the

unions notified employees they would be discharged if they did not comply with the membership requirement. (Exs. L1–3).

In August 1989, NASA's contracting officer at the Wallops Flight Facility wrote to the Klate-Holt Company and the other private contractors which had collective-bargaining agreements containing union-security agreements. He notified them that since NASA's legal counsel believed that the federal government had only "proprietary" or "concurrent" jurisdiction and not exclusive jurisdiction, and because Virginia law prohibited "union-security" agreements, NASA was notifying the appropriate Virginia agency concerning possible violation of Virginia's Right to Work law. (Ex. M1). As a result of this notice, Klate-Holt refused to enforce its "union-security" agreement.

After NASA contacted the Virginia Department of Labor and Industries ("DLI") in August 1989, the DLI commenced an investigation to determine whether state or federal law applied to the Wallops Flight Facility. The parties' "Joint Stipulation of Facts and Exhibits" contains highlights of that investigation. (*See* Exs. A, B, D3, E3, F3, H3, H4, I, K6, M3, N1–8 for an overview of the DLI investigation). In May 1990, the DLI completed its investigation and its Commissioner stated that in her view the "Federal government retain[ed] exclusive jurisdiction," therefore the DLI was not going to take any additional action. Her determination was based on the fact that the Navy periodically uses the airfield for unscheduled landing

and refueling during training exercises from a Maryland naval base and is available for emergency landings. (Ex. O).

In June 1990, NASA took issue with the DLI's "conclusion that the Federal Government appears to retain exclusive jurisdiction over Wallops Flight Facility" and wrote a letter asking for "any guidance that you or the [Virginia] Attorney General can give us on how we should proceed to [conclusively resolve the jurisdictional question]." (Ex. P).

On September 10, 1990, the DLI Commissioner responded by clarifying the Department's decision that the federal government retained exclusive jurisdiction over Wallops, and recommending that if NASA wanted to change the jurisdictional status of Wallops, it follow the procedures contained in Virginia Code Section 7.1-25.1. (Ex. Q).

Notwithstanding the DLI Commissioner's letter of September 10, 1990, NASA continued to maintain that it had only proprietary jurisdiction over the Wallops Flight Facility. In a series of letters to interested parties, including agents and representatives of the unions, NASA reiterated its position *viz-a-viz* jurisdiction while noting that it was the Agency's long-standing policy to remain neutral regarding any disputes between the unions and contractors over the enforceability of union-security agreements.

In April 1992, the unions attempted to enforce their union-security agreement against Mr. Pusey and various other non-union employees of H & H Consolidated (Klate-Holt's successor). The unions were unsuccessful. (Exs. R5–6).

On January 1, 1994, a new collective-bargaining agreement between Mr. Pusey's employer and the unions went into effect. Paragraphs D and E of Article VI are the union-security and hold-harmless clauses of the agreement which are at issue in this litigation. (Ex. T1, p.5). Following the expiration of a thirty (30)-day grace period, the unions enforced the agreement by notifying non-union employees—including Mr. Pusey—of their obligations under the union-security agreement, as well as informing the company that, after notice, the non-union employees had still not complied with the agreement. (Exs. T2–3).

Local Union 2552 then renotified Mr. Pusey of his obligations under the union-security clause and gave him five (5) days in which to comply or it would seek his discharge. Likewise, the company notified Mr. Pusey of his obligations and gave him until May 16, 1994 to either, (1) become a member of the union or pay the required service fee or, (2) be discharged on that date. On May 11, 1994, Local 2552 notified H & H Consolidated that Mr. Pusey had not complied with the union-security clause and formally

requested his discharge.[3] On May 13, 1994, H & H Consolidated notified Mr. Pusey that he was discharged effective 8:00 a.m. on May 16, 1994. (Exs. T8–11).

As early as 1982, the Virginia Attorney General took the position that the federal government did not have exclusive jurisdiction over Wallops. (Ex. I). That position was reiterated on September 16, 1994, when Virginia Deputy Attorney General Paul Woodley responded to NASA, stating:

> I do not agree with your opinion concerning jurisdiction over the four mainland parcels. With respect to parcel 4, the United States, in the absence of any formal acceptance, in my opinion, enjoys simple proprietary jurisdiction over the territory shown as parcel 4, and always enjoyed only proprietary jurisdiction over it. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). Practice or perception do not substitute for formal acceptance. With respect to the other three parcels, the United States no longer enjoys exclusive jurisdiction

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[3]In a letter dated May 12, 1994, NASA wrote Virginia Attorney General Gilmore reversing its prior longstanding position and now concluding that the federal government did have exclusive jurisdiction over Parcels I through IV. NASA further requested the opinion of the Virginia Attorney General on some jurisdiction questions.

> over that territory because in 1961 the land ceased to be controlled by the Navy, and the United States no longer occupies it for naval purposes.

(Ex. U2).

In 1995, Respondent Frederick Pusey filed a lawsuit against Petitioners in the Circuit Court of Accomack County for violating his right to work under VA. CODE ANN. §§ 40.1-58 to -69 (Michie 1994). Petitioners removed the case to the U.S. District Court for the Eastern District of Virginia. The U.S. District Court remanded the case to the Accomack County Circuit Court, finding "that there exists a genuine issue of material fact as to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction." (App. 10a). On remand, after full briefing by the parties, the Accomack County Circuit Court ruled on cross-motions for summary judgment and made the factual determination that the federal government does not have exclusive jurisdiction over the Wallops Flight Facility. The circuit court found that Petitioners were liable for Respondent's discharge. A jury then awarded Respondent damages in the amount of $135,000, with interest.

REASONS FOR DENYING THE WRIT

This case is not worthy of review. It presents a split neither in the circuits nor in any appellate courts, and is not contradictory to any decision of this Court.

Petitioners do not claim any split in the circuits is involved in this case. Petitioners are left to argue that the court's decision below was wrong and that this Court should take this case to overturn the unreported factual determination made by the trial court. The U.S. Supreme Court is not a trier of fact. Second-guessing factual determinations of trial courts is not a role for the nation's High Court. This was not and is not a case worthy of review. Moreover, the federal district court remanded this case to the state court and in so doing determined that the state court should make the factual determination whether the federal government had exclusive or proprietary jurisdiction over the enclave.

Petitioners further argue that their Petition should be granted so this Court might provide guidance to lower courts how to determine when the federal government divests itself of exclusive jurisdiction over an enclave. There is no confusion — much less widespread confusion — in the lower courts that calls out for this Court to provide them guidance. The paucity of reported cases involving this question, much less any split in appellate decisions on this issue, dramatizes that there is no need for this Court to provide guidance to the courts below.

Finally, the determination of the trial court concerning the status of the enclave was correct. Petitioners present no cogent reason to reverse that determination.

I. This Case Involves a Factual Dispute. There Is No Split in the Circuits or Amongst Any Appellate Courts, and the Decision of the Court Below Is Not Contrary to the Decisions of This Court.

A. There Is No Split in the Circuits and This Case Is Not Contrary to Any Decision of This Court.

Petitioners fail to point to a single split in the circuits or any conflict between the holding of the court below and that of any appellate court.

Petitioners claim that the decision below is contrary to this Court's holding in *Humble Pipe Line v. Waggonner*, 376 U.S. 366 (1964). That is not true. This case presents no conflict with *Humble Pipe Line*. The distinction between *Humble Pipe Line* and this case is based solely on factual issues. *Humble Pipe Line* stands for the proposition that when the federal government acquires exclusive jurisdiction over an enclave for military purposes, the fact that the government subsequently leases out a portion of the enclave does not divest the federal government of its exclusive jurisdiction. The case below does not in any way contradict that holding. This case, unlike *Humble Pipe Line*, does not involve the lease of a portion of an enclave, but rather the total abandonment of the entire enclave.

Similarly, Petitioners are mistaken when they argue that the case below is in conflict with the Second Circuit's decision in *United States v. Johnson*, 994 F.2d 980 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993). In *Johnson*, the

defendant-appellant challenged his criminal conviction for acts occurring on federal property to which exclusive jurisdiction was ceded "for use in connection with the expansion of the Brooklyn Navy Yard," and was related to a parcel for which exclusive jurisdiction was ceded for use as a "navy yard and naval hospital," for "so long only as the land shall be used for the purposes of the cession." The defendant challenged his conviction on the theory that since the Brooklyn Navy Yard was no longer used for shipbuilding — although it still was used by the Navy "for other ancillary naval functions" — the conditions of the cession no longer were met. The United States Court of Appeals for the Second Circuit rejected this interpretation of "antiquated deeds" as "too strict." 994 F.2d at 986. However, the court conceded that "it is conceivable that some evolution might exceed the conditions of a grant of land so severely as to terminate the cession and cause a reversion of jurisdiction." *Id.* As discussed by the court below, this case is easily distinguishable from *Johnson*. *Johnson* involved an evolution of naval use over time. This case involves not an evolution of use by the Navy but a total abandonment.

B. This Case Involves a Question of Fact That Is Not Appropriate for Review by This Court.

A simple issue was presented to the state circuit court: Did the federal government have exclusive or concurrent jurisdiction over the federal enclave where Respondent Frederick Pusey was employed? If so, did the

employer and unions violate the Virginia Right to Work law when Mr. Pusey was fired for not joining or financially supporting the unions?

That question is factual. After removal, the U. S. District Court for the Eastern District of Virginia remanded the case to the Accomack County Circuit Court, finding "that there exists a *genuine issue of material fact as* to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction." (Emphasis added) (Appendix ("App.") 10a).

The circuit court reviewed the factual record and determined that the federal government did not have exclusive jurisdiction over the enclave. Petitioners' attempts to argue that the case below was wrongly decided are fact-based claims. Unless this Court wishes to become the trier of fact to determine what the Navy did when it abandoned the enclave, which parcels the Navy subsequently occupied during its limited post-abandonment use and what the Navy did on those parcels, it should deny review. The Petitioners' primary factual argument involves the question whether NASA's launching of missiles for the Armed Services constitutes use of the enclave for naval purposes.[4] That argument overlooks the fact that the Navy

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[4]Petitioners have apparently abandoned one of their central factual arguments made in their unsuccessful Petition to the Virginia Supreme Court, that Wallops Flight Facility may be a cover for the

abandoned the enclave, and that the post-abandonment launches were from sites on Wallops Island—a location where the federal government **never** had exclusive jurisdiction.

In any event, all the facts were before the trial court, the judge considered those facts, and made the factual determination that the federal government did not have exclusive jurisdiction on the enclave. It would be inappropriate for this Court to displace the trial court and become the trier of fact.

C. Petitioners' Argument That Various Agencies Viewed the Federal Government's Jurisdiction as Exclusive Is Wrong.

Petitioners argue that NASA, the National Labor Relations Board ("NLRB"), the Virginia Department of Labor, and an arbitrator were of the view that exclusive jurisdiction lay with the United States. That is not the case. The views of the various agencies concerning the "jurisdictional" status of the Wallops Flight Facility ebbed and flowed over time. Admittedly, the Virginia Department of Labor did argue that the federal government had exclusive jurisdiction, but that was based on a flimsy reed – that the Navy occasionally used the base for aircraft landings in

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CIA or other secret government agency and therefore Virginia would not desire concurrent jurisdiction over the enclave.

training programs and that it was made available in emergency situations. (Exs. N 1-8, O).

The NLRB determination is irrelevant. The decision of the NLRB was not a decision of the Board, but merely a refusal to issue a complaint by one of its regional offices, a determination which is not a decision on the merits. (Ex. T6).

With respect to NASA, the evidence is that for over thirty (30) years, NASA maintained it had only a "proprietary interest" in the land. (Exs. 2, K3, M3, N1, P, R1, R3-4). It was only in a letter to the Virginia Attorney General, dated one day before Petitioner-employer notified Mr. Pusey of his discharge that NASA reversed course. (Ex. U2). Therefore, the position of NASA does not support Petitioners' claim.

Furthermore, the Attorney General of Virginia has consistently maintained that NASA has only a proprietary interest in the land. (Exs. H1, U2).

Additionally, the Petitioner-employer for five (5) years maintained that it could not enforce the union-security agreement because it would violate Virginia law.[5]

Lastly, the "arbitration" involved an "arbitration" in which neither Mr. Pusey nor the employer was a party. The

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[5]In the spring of 1994, Petitioner-employer apparently changed its position after the unions pointed out that the company was protected by the "hold-harmless" clause.

arbitrator, in his decision, held that no court of competent jurisdiction had ever ruled on whether the Virginia Right to Work law applied on the enclave and his determination was conditioned upon the absence of any such ruling. (Ex. S).

Although various agencies made conflicting factual determinations over time, the court below was the only court of competent jurisdiction to examine the question, and it made a ruling based upon the facts of the case. It is neither necessary nor appropriate for this Court to now make factual determinations concerning if and when the Navy had a presence on the enclave.

II. The Court Below Was Correct in Finding That the State of Virginia Had Concurrent Jurisdiction Over the Enclave.

Petitioners argue that this Court should review the unreported fact-finding of the court below. They argue that although the Navy abandoned the post, it was still used at times for naval purposes and, therefore, the federal government maintained exclusive jurisdiction over the enclave. That argument is without merit.

The principle that States may attach conditions to the cession of property and that federal jurisdiction can be exercised for only so long as those conditions are met is well established. *United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993), *citing S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1945), *and Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *see*

also United States v. Unzeuta, 281 U.S. 138, 142 (1930) (when the United States acquires land by a state ceding its jurisdiction, the state may impose "conditions which are not inconsistent with the carrying out of the purpose of the acquisition").

As set forth in the Statement of the Case, it is clear that: (1) the federal government owns the four parcels of land that make up the Wallops Flight Facility; (2) during the 1940s, the Commonwealth of Virginia ceded "exclusive" jurisdiction to the federal government (the U.S. Navy) over three of those land parcels (Parcels I, II and III); (3) the Commonwealth's grant of "exclusive" jurisdiction was conditioned upon the federal government's continued ownership of the land and the use of the land for naval purposes; (4) the three parcels of land over which the federal government had "exclusive" jurisdiction ceased to be used for "naval purposes" no later than December 1961 (when the land was formally transferred to NASA); and (5) the federal government never sought or obtained "exclusive" jurisdiction over the fourth parcel (Parcel IV).

Virginia law begins from the presumption that jurisdiction over land which is owned by the United States is concurrent unless it is shown that the United States was deeded the land and accepted exclusive jurisdiction over it. *Smith v. Commonwealth*, 219 Va. 455, 461, 248 S.E.2d 135, 139-40 (1978), *cert. denied*, 441 U.S. 967 (1979); *see also* VA. CODE ANN. § 7.1-21. Further, the General Assembly has established a very specific procedure by which

"additional" jurisdiction is ceded to the United States, VA. CODE ANN. §§ 7.1-21(2) & (4), and that such grants are subject to the limitations contained in the deed of cession. VA. CODE ANN. § 7.1-21(6).

Likewise, this Court held long ago that a State may cede jurisdiction over land contained within its borders with limitations, and that cession without limits is not constitutionally required. This Court stated:

> Assuming that ... we are at liberty to construe the [Washington] statute for ourselves, **we should**, in harmony with our principles of decision in such cases, **give great weight to the views of the state court as to the intent and limitations of the state statute in granting consent and cession**.

Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 206-07 (1937) (emphasis added; citations omitted).

The undisputed facts in this case establish beyond question that three of the four parcels comprising the Naval Air Station at Chincoteague once were subject to exclusive federal jurisdiction, but the fourth was not. However, the Commonwealth's cession of exclusive jurisdiction over the three parcels specifically was conditioned upon its "use and occup[ation] by the United States for naval purposes," (Ex. A) conditions not met after the Navy conveyed the property to NASA, which has utilized the property as a flight facility.

The lands acquired during World War II— Parcels I, II and III—ceased to be used for "naval purposes" when the U.S. Navy closed its naval air station on June 30, 1959, or at the latest, when it formally transferred the land and facilities to NASA in December 1961. When the lands ceased to be used for naval purposes, the Commonwealth's grant of "exclusive" jurisdiction to the federal government terminated and, by operation of law, reverted to the Commonwealth of Virginia. Since 1962, NASA has listed the jurisdictional status of the Wallops Flight Facility as proprietorial interest only.

Clearly, NASA did not have, or even claim to have "exclusive" jurisdiction over the Wallops Flight Facility, the federal property upon which NASA subsequently launched missiles. NASA did not "use and occupy the land for naval purposes," as required by the 1940 grant of exclusive jurisdiction. "Exclusive" federal jurisdiction ceased long before Mr. Pusey was terminated or even became employed on the facilities. The Navy's subsequent entry as a tenant, twenty-seven (27) years after the fact on other parcels of land, did not restore the federal government's jurisdiction over Parcels I, II, and III. The occupation of the actual Island by the Navy did not in any way magically recreate a jurisdictional claim that was abandoned years earlier, or create a new claim of jurisdiction exclusively over land which the federal government never had exclusive jurisdiction (Parcel IV and the Island). Accordingly, Mr. Pusey was protected by the Commonwealth's Right to Work law,

and his termination for refusing to comply with the unions' demands was unlawful.

As recognized by the court below, the federal government had exclusive jurisdiction over Parcels I, II and III, but lost "exclusive" jurisdiction over them in December 1961, when the Navy abandoned its base and turned it over to NASA. The federal government never had jurisdiction over Parcel IV or the Island. Nothing subsequently done by the federal government restored the abandoned exclusive jurisdiction. Therefore, the unreported decision of the court below was correct and should not be reviewed by this Court.

CONCLUSION

This case involves no split in the circuits, no conflict with any appellate courts, and no conflict with any decisions of this Court. The issues raised in the Petition are primarily factual questions that this Court should not review. The Petition should be denied.

Respectfully submitted,

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March 2001

APPENDIX A

Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia

April 25, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

[date stamp omitted in printing]

FREDERICK A. PUSEY,

Plaintiff,

v. **CIVIL ACTION NO. 2:95cv134**

H & H CONSOLIDATED, INC., LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, and DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is the plaintiff's motion to remand the suit to state court. The defendants have filed memoranda in opposition to the plaintiff's motion, and the plaintiff has filed a reply brief. The Court conducted a hearing on the matter on April 24, 1995.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Frederick A. Pusey ("Pusey") is a citizen of the state of Maryland. Defendant H & H Consolidation, Inc. ("H & H") is a foreign corporation transacting business in Virginia and is registered with the Virginia Corporation Commission. Defendants International Association of Machinists & Aerospace Workers Local Lodge 2552 ("Local 2552") and International Association of Machinists & Aerospace Workers District Lodge 74 ("District 74") are unincorporated associations organized for the purpose of acting as a labor organization and serve as the bargaining agent for the employees of H & H at the Wallops Island Flight Facility, Wallops Island, Virginia.

The Plaintiff began working for H & H as an electronic technician in January 1987 at H & H's facilities on Wallops Island. The National Aeronautics and Space Administration ("NASA") operates a facility on Wallops Island, and H & H contracts with NASA to provide technical support. On January 1, 1994, H & H entered into a collective bargaining agreement ("the agreement") with Local 2552 and District 74. The agreement contains a union security agreement,[1] whereby H & H agreed to

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[1]The plaintiff in his complaint characterizes the agreement as a "checkoff" provision. A checkoff provision authorizes an employer to deduct union membership dues directly from an employee's wages and remit them to the union. See 29 U.S.C. § 186(c) (4) (stating that statutory language prohibiting payments by an employer to a bargaining unit "shall not be applicable . . . with respect to money

require all present and future employees to join as members of the union or pay a monetary sum equivalent to union dues. Failure of an employee to meet the terms of the security agreement requires H & H to dismiss the employee from his employment. The agreement section states:

> All present employees who are members of the Union on the effective date of this Agreement shall remain members of the Union in good standing or pay an amount equivalent to the Union Dues. Present employees who are not members of the Union and/or employees who are hired hereafter, shall become and remain members in good standing in the Union or pay an amount equivalent to the Union dues on and after the 31st day following the effective date of this Agreement, whichever is the latter. This money is to pay the Union's cost of representing employees for the purpose of collective bargaining and this authorization is not conditioned on present or future membership in the Union.[2]

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deducted from the wages of employees in payment of membership dues in a labor organization").

[2]Complaint Ex. A (Collective Bargaining Agreement section VI).

On May 2, 1994, Local 2552 sent the plaintiff a letter stating that pursuant to the collective bargaining agreement, the plaintiff was required to join the union and pay its dues or "pay a service fee as a condition of employment."[3] The letter further stated that failure to comply with the union security agreement would result in the union's request to H & H that the plaintiff be terminated from his position.[4] The plaintiff did not comply with the terms of the union security provision of the collective bargaining agreement, and on May 13, 1994, H & H notified the plaintiff by letter that his employment with H & H would be terminated as of May 16, 1994 due to his failure to join the union or pay an amount equivalent to union membership dues.[5]

On January 17, 1995, the plaintiff filed a motion for judgment in Accomac County, Virginia Circuit Court against defendants H & H, Local 2552 and District 74. In his motion, the plaintiff alleges that H & H terminated him from his position in violation of the Virginia right-to-work statute. See Va. Code Ann. §§ 40.1-58 to - 69 (Michie 1994). In Count One of his motion the plaintiff states that the union security provision of the collective bargaining agreement violates public policy as stated in the Virginia

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[3]See Complaint Ex. B.

[4]Id. H & H sent the plaintiff a letter on May 3, 1994 setting forth a similar request pursuant to the agreement See Complaint Ex. C.

[5]Complaint Ex. D.

right-to-work statute based on its requirement that the plaintiff must support the union. The plaintiff further alleges that the provision violates the statute's prohibition against agreements between employers and unions that deny non-union member employees the right to work unless the employee pays a fee. See id. § 40.1-59. The plaintiff requests damages from the defendants in the amount of $300,000, including attorney's fees.

On February 8, 1995, defendant H & H filed a petition for removal in this Court pursuant to 28 U.S.C. § 1404. Defendant H & H alleged that removal was proper under 28 U.S.C. § 1331 based on the plaintiff's request that the Court interpret the collective bargaining agreement. On February 9, 1995, defendants Local 2552 and District 74 filed a notice of removal in this Court, alleging the same jurisdictional bases as those asserted by defendant H & H. On February 9, 1995, defendant H & H filed its answer and affirmative defenses, and on February 16, 1995, defendants Local 2552 and District 74 filed their answer and affirmative defenses.

On March 3, 1995, the plaintiff filed a motion and supporting brief to remand the action to state court. In its supporting brief the plaintiff argues that the Court lacks both diversity and federal question jurisdiction over the present action. The plaintiff states that the action concerns a violation of the state right-to-work statute and that such a violation would be properly addressed by a state court.

On March 17, 1995, defendants Local 2552 and District 74 filed a memorandum in opposition to the plaintiff's motion to remand. The defendants argue that the plaintiff has alleged a violation of the collective bargaining agreement which grants the Court jurisdiction to hear the action. The defendants also argue that jurisdiction is proper based on the nature of the Wallops Island Facility. The defendants assert that the facility is on federal property, and Virginia courts may not exercise their jurisdiction over the facility. On March 17, 1995, defendant H & H filed a memorandum in opposition to the plaintiff's motion to remand. The defendant argues that jurisdiction by the Court is proper because the Wallops Island facility is a federal enclave outside the jurisdictional authority of Virginia, and the state right-to-work statute does not apply to the parties' collective bargaining agreement.

II. STANDARD OF REVIEW

Where a party brings an action in state court over which a federal district court would have original jurisdiction, the action "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). The United States Court of Appeals for the Fourth Circuit has stated that "[t]o be removable to federal court under 28 U.S.C. § 1441 a state action must be within the original jurisdiction of the court, and its jurisdiction must be ascertainable from the face of the complaint." Hunter Douglas Inc. v. Sheet Metal

Workers Int'l Ass'n Local 159, 714 F.2d 342, 345 (4th Cir. 1983). However, if a district court finds that it lacks subject matter jurisdiction over the action, it may remand the suit back to state court. 28 U.S.C. § 1447(c); see also Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1276 (4th Cir. 1985).

III. ANALYSIS

In the present action the plaintiff has alleged that the union security agreement violates the Virginia right-to-work statute. Virginia has enacted a right-to-work statute that ensures that an individual is not denied the right of employment based upon a requirement of membership in a union. Va. Code Ann. §§ 40.1-58 to -69 (Michie 1994). The statute states:

> Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

Id. § 40.1-59. The statute further states that "[n]o person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer." Id. § 40.1-60. The statute also prohibits the requirement that an employee who is not a member of a union pay union dues. Id. § 40.1-62.

NASA operates the Wallops Island facility at which the plaintiff worked prior to his termination. The defendants contend that the facility is under the jurisdiction of the federal government and removal was proper based on the Court's original jurisdiction over the action. The plaintiff counters that he seeks to redress a violation of the state right-to-work statute and has not pleaded a violation of a federal right in his complaint. Both parties have submitted evidence regarding the status of Wallops Island as an enclave of the federal government.

The United States Constitution empowers the federal government to purchase property for use by the government. U.S. Const. art. 1, § 8, cl. 17. The purchase of land, however, does not grant the federal government exclusive jurisdiction over the property. United States v. State Tax Comm'n, 412 U.S. 363, 372 (1973); Waltrip v. Virginia, 189 Va. 365, 369, 53 S.E.2d 14, 16 (1949). To obtain exclusive jurisdiction, the head of a federal department or agency must "accept or secure from the State in which any lands or interests . . . are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore

obtained, over any such lands or interests as he may deem desirable and indicate acceptance . . . by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." 40 U.S.C § 255.

Virginia has prescribed the method by which the federal government may obtain jurisdiction from the state:

> Whenever the head or other authorized officer of any department or independent establishment or agency of the United States shall deem it desirable that additional jurisdiction or powers be ceded over any lands in Virginia acquired or proposed to be acquired by the United States under his immediate jurisdiction, custody or control, and whenever the Governor and Attorney General of Virginia shall agree to the same, the Governor and Attorney General shall execute and acknowledge a deed in the name of and under the lesser seal of the Commonwealth ceding such additional jurisdiction. . . .

Va. Code Ann. § 7.1-21(2) (Michie 1993). The Virginia statute further requires that "[n]o such deed shall become effective or operative until the jurisdiction therein provided for is accepted on behalf of the United States as required by [40 U.S.C. § 255]." Va. Code Ann. § 7.1-21(3). Once the federal government has acted to obtain jurisdiction over the

property, the Virginia statute provides for the reversion of jurisdiction to Virginia:

> If the United States shall cease to be the owner of any lands, or any part thereof, granted or conveyed to it by the Commonwealth; if the purposes of any such grant or conveyance to the United States shall cease; or if the United States shall for five consecutive years fail to use any such land for the purposes of the grant or conveyance, then, and in that event, the right and title to such land, or such part thereof, shall immediately revert to the Commonwealth . . . .

Id. § 7.1-22.B.

The Court FINDS that there exists a genuine issue of material fact as to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction. On February 7, 1940, the Virginia General Assembly approved an act ceding exclusive jurisdiction to the federal government over several parcels of land, including the Wallops Island area. 1940 Va. Acts 14. The act conditions the cession of exclusive jurisdiction on the stipulation that "the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." Id. Defendants Local 2552 and District

74 submitted copies of letters dated May 5, 1943 and August 30, 1949 from the Secretary of the Navy to the Governor of Virginia purporting to accept exclusive jurisdiction over three parcels on Wallops Island for use by the United States Navy.[6] The three letters are signed by the governor. The defendants have also provided a copy of a letter dated September 10, 1990 from the Commissioner of the Virginia Department of Labor and Industry setting forth the department's finding that the federal government continued to exercise exclusive jurisdiction over Wallops Island.[7] The Commissioner states that she weighed particular factors in making the conclusion: "official action taken to establish and/or relinquish jurisdiction; the way in which the facility operated and presented itself in terms of jurisdiction; and finally, the way in which the facility was perceived and treated by other units of government."[8] The Commissioner considered the three letters by the Secretary of the Navy as well as the failure of the federal government to provide Virginia with notice of the cessation of the exercise of jurisdiction. The plaintiff has submitted a letter dated September 16, 1994 from the Office of the Attorney General of Virginia stating that in the view of the author of the letter, a deputy attorney general, the United States no

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[6]See Defendants Local 2552 and District 74's Memorandum in Support Ex. 3.

[7]See Defendant H & H's Memorandum in Support Ex. A.

[8]Id.

longer exercises exclusive jurisdiction over Wallops Island. The author cites the fact that the United States Navy had ceased to use the island for naval purposes, allowing NASA to maintain its facility on the island.

The Virginia Supreme Court has held that Virginia retains jurisdiction over land owned by the federal government unless it is demonstrated that the United States was deeded the land and acted affirmatively to accept jurisdiction. Smith v. Virginia, 219 Va. 455, 461, 248 S.E.2d 135, 139 (1978), cert. denied, 441 U.S. 967 (1979). The United States must act in the manner prescribed in the Virginia statute regarding cession of jurisdiction in order to exercise exclusive jurisdiction. Waltrip, 189 Va. at 369, 53 S.E.2d at 16. The Virginia Supreme Court has stated:

> The question whether a Federal area within a State is subject to exclusive jurisdiction is complicated and often difficult to decide. A determination depends upon many factors, jurisdiction being subject to the terms, conditions, restrictions, limitations and provisions of the acquisition of the United States, including the consent of the State, and acceptance by the United States.

Western Union Tel. Co. v. Virginia ex rel. State Corp. Comm'n, 204 Va. 421, 426, 132 S.E.2d 407, 411 (1963).

It is a well-accepted principle that federal courts are courts of limited jurisdiction. Owen Equip. & Erection Co.

v. Kroger, 437 U.S. 365, 374 (1978). The burden rests with the party seeking the jurisdiction of the court to demonstrate that the court has original jurisdiction over the action. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 (1936). In the present action, the defendants have removed the case to this Court on the assertion that the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. The defendants argue that the status of the Wallops Island facility as a federal enclave allows the Court to exercise its jurisdiction. However, it remains unclear whether the United States acted in accordance with the statutory authority to assume exclusive jurisdiction over the facility. If the United States did comply to obtain exclusive jurisdiction, there exists an additional question as to whether exclusive jurisdiction over Wallops Island reverted to Virginia through any statutory compliance by the United States or the use of the facility by NASA. Accordingly, the Court FINDS that the defendants have failed to demonstrate the existence of original jurisdiction by the Court over the present action. The Court ORDERS that the action be REMANDED to state court in accordance with 28 U.S.C. § 1447(c).[9]

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[9]The defendants have alleged that jurisdiction is proper pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 141 et seq., based on the plaintiff's allegation that he was terminated in violation of the collective bargaining agreement. The defendants argue that the plaintiff has purposefully avoided seeking to raise a federal claim in his complaint and urge the Court to look beyond the face of the pleadings. The Court FINDS that the

IV. CONCLUSION

The Court **FINDS** that defendants H & H Consolidated, Inc., International Association of Machinists & Aerospace Workers Local Lodge 2552, and International Association of Machinists & Aerospace Workers District Lodge 74 have failed to demonstrate that the Court has jurisdiction over the action. The Court **ORDERS** that the action be **REMANDED** to Accomac County, Virginia Circuit Court pursuant to 28 U.S.C. § 1447(c).

The Clerk is **REQUESTED** to mail a copy of this Order to all counsel of record.

It is so **ORDERED.**

/s/

United States District Judge

Norfolk, Virginia

April 25, 1995

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defendants' allegations that the plaintiff has claimed breach of the agreement does not create a basis for an exercise of the Court's jurisdiction under section 301. See Hunter Douglas, 714 F.2d at 345 (stating that to allow removal, "jurisdiction must be ascertainable from the face of the complaint"). The plaintiff alleges in his complaint that the defendants have acted in violation of the Virginia right-to-work statute, and the Court DECLINES to FIND that the plaintiff has placed the collective bargaining agreement at issue.